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In the Supreme Court of the United States

JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

v.

PACE INTERNATIONAL UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan.

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INTEREST OF THE UNITED STATES

This case presents the question whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA or the Act), 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan. The Department of Labor (DOL) is responsible for interpreting and enforcing the fiduciary duty provisions in Title I of ERISA, 29 U.S.C. 1103-1106, and the Pension Benefit Guaranty Corporation (PBGC) is responsible for interpreting and enforcing the plan termination provisions in Title IV of ERISA, 29 U.S.C. 1301-1461. In response to an invitation from the Court, the United States filed an amicus brief in this case at the petition stage.

STATEMENT

1. ERISA sets minimum standards for employee benefit plans to ensure their equitable character and financial soundness. 29 U.S.C. 1001(a). Among those standards are requirements that plan fiduciaries discharge their duties solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, with prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(A), (B) and (D). In general, a person is a fiduciary "to the extent" he exercises "any authority or control" over plan "assets" or has "discretionary authority or discretionary responsibility" in the plan's "administration." 29 U.S.C. 1002(21)(A)(i) and (iii).

One kind of pension plan governed by ERISA is a defined benefit plan. 29 U.S.C. 1002(35). In a defined benefit plan, employees are entitled, upon retirement, to fixed periodic payments. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). To ensure the availability of sufficient funds to make those payments, ERISA sets minimum funding standards for defined benefit plans. 29 U.S.C. 1001(c), 1081(a), 1082. Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, also provides an insurance program, administered by the PBGC, to protect plan participants and beneficiaries from loss of certain promised benefits upon plan termination. See 29 U.S.C. 1001(c); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 (1980).

An employer may initiate termination of a single-employer defined benefit plan covered by Title IV of ERISA "only" through "standard" or "distress" termination procedures. 29 U.S.C. 1341(a)(1). This case concerns a standard termination. In a standard termination, the plan administrator must provide advance notice to affected parties, actuarial information indicating to the PBGC that the plan's assets will be sufficient to satisfy benefit liabilities, subsequent notice to each participant and beneficiary of the amount of benefit liabilities attrib-

utable to him or her, and additional information required by PBGC regulations. 29 U.S.C. 1341(a)(2), (b)(1)(A) and (B), (b)(2); 29 C.F.R. 4041.23-4041.27. The PBGC then decides whether the plan has sufficient assets to satisfy all benefit liabilities and whether other requirements have been met. 29 U.S.C. 1341(b)(2)(C); 29 C.F.R. 4041.31. If the PBGC does not issue a notice of noncompliance, and if the plan assets are sufficient to satisfy benefit liabilities on the distribution date, the plan administrator makes a final distribution of plan assets. 29 U.S.C. 1341(b)(2)(D); 29 C.F.R. 4041.28.

Under 29 U.S.C. 1341(b)(3)(A), the plan administrator must "distribute" the assets of the plan "in accordance with" 29 U.S.C. 1344, which directs the administrator to allocate the assets "among the participants and beneficiaries of the plan" in a specified order of priority. 29 U.S.C. 1344(a). If assets are left over after benefits are satisfied, any assets attributable to employee contributions must be distributed to the participants who made the contributions or to their beneficiaries. 29 U.S.C. 1344(d)(3). After that distribution, the employer sponsoring the plan may recover any residual assets if the plan so provides and the distribution does not violate any law. 29 U.S.C. 1344(d)(1); see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989). To distribute assets, the plan administrator must either "purchase irrevocable commitments from an insurer"—*i.e.*, annuities—"to provide all benefit liabilities under the plan," or, "in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C. 1341(b)(3)(A).[1]

The PBGC's regulations similarly require the plan administrator, "in accordance with all applicable requirements un-

[1] An "[i]rrevocable commitment" is "an obligation by [a state-licensed insurance company] to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary." 29 C.F.R. 4001.2.

der the [Internal Revenue] Code and ERISA," to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." 29 C.F.R. 4041.28(c)(1). The regulations stress that "[a] plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in [29 U.S.C. 1344]." 29 C.F.R. 4044.4(a). The regulations also impose various other requirements, including that the plan administrator inform each participant and beneficiary that, after distribution of plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9).

2. a. Crown Vantage, Inc., and its subsidiary Crown Paper Co. (collectively Crown) operated paper mills in the eastern United States. Pet. App. 4. Crown's board of directors served as administrator of Crown's pension plans. *Ibid.* Respondent PACE International Union (PACE) represented employees covered by 17 of the plans. *Id.* at 5.

In March 2000, Crown filed for bankruptcy and began liquidating its assets. Pet. App. 4. In July 2001, its board of directors began to consider terminating its pension plans under a standard termination through the purchase of annuities. *Ibid.* PACE proposed that Crown instead merge the plans covering employees represented by PACE with the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan. *Id.* at 5; see 29 U.S.C. 1002(37), 1301(a)(3) (defining "multiemployer plan"). Crown's board declined that proposal and proceeded to terminate 12 of the plans (which, by then, had been merged into a single plan) by purchasing annuities.[2] Crown paid $84 million for the annuities, anticipating that, after termination and distribution of the annuity contracts to participants and beneficiaries, approximately $5 million would revert to Crown. Pet. App. 5-7.

[2] The remaining plans are not at issue in this case.

b. After Crown purchased the annuities, respondents PACE and two plan participants brought an adversary action against Crown in bankruptcy court. Pet. App. 7; see 28 U.S.C. 157. Respondents alleged that Crown had breached its fiduciary duties under ERISA by failing to give adequate consideration to PACE's merger proposal. Pet. App. 7.

The bankruptcy court agreed with respondents that Crown had breached its fiduciary duties. Pet. App. 51-73. The court acknowledged that the board of directors' decision to terminate the plan was a "business" rather than a fiduciary decision. *Id.* at 65. The court nonetheless reasoned that the decision whether to "annuitize" the plans or to merge them into PIUMPF was a fiduciary decision. *Id.* at 66. And the court found that the board did not seriously consider the proposed merger with PIUMPF. *Id.* at 65.

The court did not, however, order Crown to cancel the annuity purchase, because that would have triggered a $4 million penalty for breach of the purchase agreement. Pet. App. 61, 66-67. Instead, the court issued a preliminary injunction preventing Crown from recovering the $5 million in surplus plan assets remaining after the annuity purchase. *Ibid.* In later decisions, the court kept that injunction in effect, but approved termination of the plan and distribution of the residual assets to the participants and beneficiaries. *Id.* at 74-83. The distribution of the residual assets was stayed pending resolution of any appeals. See Pet. 9.

c. Petitioner, the liquidating trustee of the Crown bankruptcy estates, appealed to the district court. Pet. App. 29-50. The district court rejected petitioner's argument that the decision to terminate the plan by purchasing annuities rather than to merge the plan with PIUMPF was a business, not a fiduciary, decision. *Id.* at 45-46. The court held that merger is an alternative method, permitted by ERISA, of implementing a plan termination because a merger can "otherwise fully provide all benefit liabilities under the plan." *Id.* at 46 (quoting 29 U.S.C. 1341(b)(3)(A)(ii)). And the court rejected peti-

tioner's contention that the terms of the Crown plan did not authorize merger as a means of termination. *Id.* at 47-48.

d. Petitioner appealed, and the Ninth Circuit affirmed the district court's judgment in relevant part. Pet. App. 1-24. The court of appeals acknowledged that "the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations." *Id.* at 9. The court stated, however, that "the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations." *Ibid.* (citing *Waller* v. *Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994)). The court then reasoned that whether Crown breached its fiduciary duty turns on whether merger was a permissible means of implementing the decision to terminate the plan. *Ibid.* The court concluded that it was. The court construed 29 U.S.C. 1341(b)(3)(A) and 29 C.F.R. 4041.28(c)(1) to permit any method of termination that is "sufficient to cover plan liabilities," Pet. App. 12, and concluded that merger was such a method, *id.* at 14. The court rejected petitioner's arguments that merger is a procedure distinct from termination and that merging the Crown plan into PIUMPF would not "distribute" plan assets as required by Section 1341(b)(3)(A). *Id.* at 12-14. The court refused to consider whether the terms of the Crown plan permitted merger as a means of termination, because Crown had not raised that issue in the bankruptcy court. *Id.* at 10.

Finally, the court concluded that Crown breached its fiduciary duty to act solely in the interest of plan participants and beneficiaries by failing to undertake an intensive and scrupulous investigation of the proposed PIUMPF merger as an alternative to the purchase of annuities. Pet. App. 15-20. In a separate, unpublished opinion, the court upheld the distribution of residual plan assets ordered by the bankruptcy court as a remedy for Crown's fiduciary breach. *Id.* at 25-28.

e. Petitioner sought rehearing and rehearing en banc. The PBGC and the DOL filed amicus briefs in support of peti-

tioner's request, but the court of appeals denied further review. Pet. App. 84-85.

SUMMARY OF ARGUMENT

A. The court of appeals erroneously held that ERISA's fiduciary duties apply to an employer's decision whether to terminate a pension plan by purchasing annuities or instead to merge the plan with another plan. This Court has repeatedly recognized that an employer acts as a settlor, not a fiduciary, when making decisions about plan design, composition, and structure—including decisions whether to adopt, modify, or terminate a plan. The distinction between fiduciary and settlor functions follows from ERISA's provision that a person is a plan fiduciary only "to the extent" he performs specified functions. Those functions—which include plan administration, plan management, and control or disposition of plan assets—are analogous to a trustee's traditional duties at common law. In contrast, employer decisions about plan design, composition, and structure are analogous to decisions traditionally made by a trust settlor. The statutory distinction between fiduciary and settlor functions gives effect to ERISA's purposes of encouraging but not requiring the formation of plans, ensuring that plan participants and beneficiaries receive promised benefits, and preserving an employer's ability to act in its own business interests in deciding whether to create, modify, or terminate a plan.

The holding of the court of appeals is inconsistent with the established distinction between fiduciary and settlor functions. The decision whether to terminate a plan and the decision whether to merge a plan with another plan are each settlor functions, because they are choices about plan design, composition, and structure. Because both decisions, considered separately, are settlor functions, the choice to pursue one course rather than the other is also a settlor, rather than a fiduciary, decision.

B. The court of appeals also erred in holding that merger is a permissible means of plan termination. ERISA's text makes clear that merger is not a method of plan termination. The Act requires the plan administrator to distribute the assets of the terminating plan among the participants and beneficiaries of the plan in a specified order of priority. In a merger, however, the assets of the merging plan are not distributed among the participants and beneficiaries of that plan at all. Instead, the assets are transferred to the plan created by the merger, where they are commingled and used to provide benefits to all the participants and beneficiaries of that new plan. In addition, ERISA provides that an employer may, in certain circumstances, obtain a reversion of surplus plan assets following a termination. But, in a merger, employers have no possibility of receiving a reversion.

The PBGC's termination regulations also establish that merger is not a permissible means of distributing plan assets in a termination. The regulations require distribution in accordance with ERISA and in satisfaction of all plan benefits. In a merger, however, those requirements are not met. The regulations also require that participants and beneficiaries be informed that distribution extinguishes the PBGC's guarantee of benefits. That guarantee is not extinguished by a merger, however, because the PBGC continues to guarantee benefits under the merged plan.

The structure of ERISA confirms that merger is not a method of plan termination. ERISA treats merger and termination as distinct procedures, which are addressed in separate statutory sections and are subject to different requirements.

C. The holding of the court of appeals, if affirmed, would frustrate the purposes of ERISA. It would restrict the ability of an employer to recover residual assets from an over-funded plan or to cease maintaining an ERISA-covered plan, and thereby remove itself from regulation under the Act. That result would undermine ERISA's goals of encouraging plan formation and promoting adequate funding of plans. Impos-

ing a fiduciary duty on employers to consider merger as a way of terminating their plans would also increase the risk that plan participants and beneficiaries would not receive their full benefits, because merger provides less benefit security than the purchase of annuities upon plan termination. And it would also increase the exposure of the PBGC's insurance program. The PBGC would be liable for losses to individuals covered by merged plans for which its guarantee obligation would otherwise have been extinguished upon termination of the plans.

ARGUMENT

AN EMPLOYER DOES NOT HAVE A FIDUCIARY OBLIGATION TO CONSIDER MERGER AS A MEANS OF TERMINATING A DEFINED BENEFIT PENSION PLAN

The court of appeals erroneously held that ERISA imposes a fiduciary obligation on an employer that sponsors and administers a defined benefit plan to consider merger as a way to implement the employer's decision to terminate the plan. That unprecedented holding misconstrues ERISA in two fundamental ways. First, it fails to recognize that an employer's choice between terminating a plan and merging the plan with another plan is a settlor rather than a fiduciary act. Second, it rests on the mistaken premise that merger is a permissible method of terminating a defined benefit plan.

A. An Employer Acts As A Settlor, Rather Than A Fiduciary, In Deciding Whether To Terminate A Pension Plan Or To Merge It With Another Plan

1. ERISA draws a fundamental distinction between settlor and fiduciary actions

Under ERISA, an employer, like Crown, that establishes or maintains a single-employer employee benefit plan is the plan sponsor. 29 U.S.C. 1002(16)(B)(i). The employer may also choose to act as administrator of the plan. See 29 U.S.C. 1002(16)(A); *Varity Corp.* v. *Howe*, 516 U.S. 489, 498 (1996).

But ERISA draws a fundamental distinction between the employer's actions in those two capacities. When the employer acts as plan administrator, or otherwise exercises authority over the management or disposition of plan assets, the employer acts as a plan fiduciary. Its actions are therefore subject to ERISA's requirement that plan fiduciaries act solely in the interest of plan participants and beneficiaries, with prudence, and in accordance with plan documents insofar as they are consistent with ERISA. In contrast, when the employer acts as plan sponsor—making decisions about the design, composition, or structure of the plan—the employer acts as the settlor of the plan. The employer is not subject to ERISA's fiduciary obligations and may instead make its decisions based on business considerations.

a. This Court has repeatedly recognized the basic distinction between settlor and fiduciary functions. The Court first discussed the distinction in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995), which held that a provision in a welfare plan stating that the sponsor could amend the plan at any time was valid under ERISA Section 402(b)(3), 88 Stat. 875 (29 U.S.C. 1102(b)(3)). In reaching that conclusion, the Court noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. The Court explained that employers do not act as fiduciaries when taking those actions. *Ibid.*

The Court applied that principle to a pension plan in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). *Spink* held that the employer did not breach any fiduciary duty under ERISA when it amended its retirement plan for business reasons. *Id.* at 889-891. Relying on *Curtiss-Wright*, the Court stated that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.* at 890. The Court explained that "amending or terminating a plan" involves "plan design" rather than "plan 'management' or 'administration.'" *Ibid.* (citations omitted).

The Court provided further elaboration in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In that case, the Court held that claims that Hughes breached its fiduciary duties in amending its pension plan were "directly foreclosed by *Spink*'s holding that, without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'" *Id.* at 445 (quoting *Spink*, 517 U.S. at 890). The Court explained that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Id.* at 444. Thus, "ERISA's fiduciary duty requirement simply is not implicated where" an employer, acting as a plan's "settlor, makes a decision regarding the form or structure of the [p]lan." *Ibid.*

b. The distinction between settlor and fiduciary acts follows from ERISA's definition of fiduciary. See *Spink*, 517 U.S. at 890. As relevant here, ERISA provides that a person is a plan fiduciary "to the extent * * * he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets," or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A)(i) and (iii). Although those terms are not defined in ERISA, they have a traditional meaning under the law of trusts, and ERISA generally uses them in accordance with that traditional common-law meaning. See *Pegram* v. *Herdrich*, 530 U.S. 211, 224 (2000); *Varity*, 516 U.S. at 502.

"At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries." *Pegram*, 530 U.S. at 231. Fiduciary "administration" means "to perform the duties imposed, or exercise the powers conferred, by the trust documents." *Varity*, 516 U.S. at 502. The general rule at common law was therefore that a trustee could exercise only those powers that were

conferred by the terms of the trust or that were necessary and appropriate to carry out the purposes of the trust and were not forbidden by its terms. Restatement (Second) of the Law of Trusts § 186, at 399 (1959) (Restatement); see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 541, at 161-162 (rev. 2d ed. 1993) (Bogert). ERISA similarly requires a plan fiduciary to discharge his duties "in accordance with the documents and instruments governing the plan insofar as * * * [they] are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

In contrast to a trust's fiduciary, the settlor creates the trust and sets its terms. Restatement §§ 3, 4. The settlor may retain broad authority to revoke or to modify the trust. *Id.* §§ 330, 331; Bogert § 993, at 230-231; *id.* § 1000, at 307. ERISA plan sponsors who alter the terms of a plan or revoke the plan by terminating it are thus "analogous to the settlors of a trust" and "do not act as fiduciaries." *Spink*, 517 U.S. at 890 (citations omitted).[3]

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[3] The Restatement (Third) of the Law of Trusts, adopted by the American Law Institute in 2003, contains a new provision that states that a "trustee may divide a trust into two or more trusts or combine two or more trusts into a single trust, if doing so does not adversely affect the rights of any beneficiary or the accomplishment of the trust purposes." Restatement (Third) of the Law of Trusts § 68, at 531 (2003). That provision represents a departure from the traditional common law rule described in the Second Restatement. See *id.*, Reporter's Notes on § 68, at 533. The new provision therefore does not shed light on the correct construction of ERISA's definition of fiduciary, which was enacted many years earlier against the backdrop of the traditional common law rule, as expressed in the Second Restatement. Moreover, the new provision does not authorize the type of merger at issue here. The commentary explains that the new provision does not authorize a trustee to combine a trust with another trust "where the interests of beneficiaries will be materially altered." *Id.*, cmt. a, at 532. The merger proposed by PACE would have materially altered the interests of the beneficiaries of the Crown plan by, among other things, exposing the assets of the Crown plan to the benefit claims of the beneficiaries and participants of the PIUMPF. Cf. *id.*, Illustration, at 532-533 (giving, as an example of an authorized combination, the combination of two trusts with identical beneficiaries and identical terms); see also National

c. The limitations on the scope of ERISA's fiduciary duties reflect the Act's basic premises and purposes. ERISA does not require employers to create benefit plans or to provide any particular kind or level of benefits. See *Spink*, 517 U.S. at 887; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA therefore generally allows employers to decline to adopt, to alter, or to terminate benefit plans for any reason, including the employer's business interests. That freedom permits employers to amend plans to comply with new laws or to streamline their operations, see *Spink*, 517 U.S. at 885, to encourage early retirement, see *Hughes Aircraft*, 525 U.S. at 436, or to provide a single plan for employees after acquiring another company, see *Malia* v. *General Elec. Co.*, 23 F.3d 828, 829-830, 833 (3d Cir. 1994). Moreover, employers may obtain "incidental benefits" from altering a plan, *Hughes Aircraft*, 525 U.S. at 445, including a reversion of surplus assets following plan termination, see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989).

Instead of requiring employers to create benefit plans, ERISA seeks to *encourage* plan formation, as well as the adequate funding of plans. 29 U.S.C. 1001(a) and (c), 1001a(c), 1001b(c). The freedom that ERISA gives employers to alter and to terminate plans furthers those goals. It reassures employers that they retain substantial authority over the structure of and the benefits provided by the plans that they create. Employers know that, if they fully satisfy their benefit liabilities under a pension plan, they may replace it with another kind of plan or choose to maintain no plan at all. And employers need not hold back in funding their plans because,

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Conference of Commissioners, *Uniform Trust Code* § 417, cmt., at 75 (2005) ("Typically the trusts to be combined will * * * vary on only insignificant details * * * . The more the dispositive provisions of the trusts to be combined differ from each other the more likely that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved.").

if their plans so provide, they can recover surplus assets by terminating the plans and obtaining reversions.

At the same time, ERISA seeks to ensure that employees receive the benefits that they have been promised by employers. *Spink*, 517 U.S. at 887; *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980); 29 U.S.C. 1001, 1001a(c), 1001b(c). ERISA thus requires that decisions about the administration and management of a plan be made solely in the interest of the plan's participants and beneficiaries, for the exclusive purpose of providing benefits to them, with a high degree of prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1). See 29 U.S.C. 1106(a) (categorically prohibiting certain transactions likely to injure the plan); 26 U.S.C. 4975 (parallel Internal Revenue Code provisions). Those strict limitations on fiduciary actions work together with the broad freedom of plan sponsors to amend or to terminate plans in furthering ERISA's basic goals.[4]

2. *The choice between terminating a plan and merging it with another plan is a settlor, rather than a fiduciary, decision*

a. The court of appeals' holding that an employer has an obligation to consider merging its pension plan with another plan instead of terminating the plan by purchasing annuities cannot be squared with the distinction between settlor and fiduciary actions. An employer's decision whether to termi-

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[4] When a plan is established or maintained by two or more employers or by one or more employers and employee organizations, the "plan sponsor" is "the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." 29 U.S.C. 1002(16)(B)(iii). The activities of a joint board are not at issue here, but the DOL has stated that, unless the relevant plan documents contemplate that the board will act as fiduciaries in carrying out activities that would otherwise be settlor in nature, those activities will generally be viewed as settlor activities. DOL, *Field Assistance Bulletin 2002-2* (Nov. 4, 2002), <http://www.dol.gov/ebsa/regs/fab_2002-2.html>.

nate a plan is not a fiduciary function. It "cannot be an action of plan 'management' or 'administration.'" *Spink*, 517 U.S. at 890 (citation omitted). Nor is it taken "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D); cf. Restatement § 186 (fiduciary duty to act in accordance with trust terms). Instead, the decision whether to terminate a plan is a quintessential example of a choice about plan design, composition, and structure. Termination is a fundamental alteration of the plan terms by the elimination of the plan, analogous to a settlor's revocation of an ordinary trust. See *id.* § 330. This Court has therefore repeatedly made clear that the decision to terminate a plan is a settlor action that is not subject to ERISA's fiduciary duties. *Spink*, 517 U.S. at 890; *Curtiss-Wright*, 514 U.S. at 78.

An employer's decision whether to merge a pension plan with another plan is similarly a settlor rather than a fiduciary action, akin to modification of the terms of a trust. See Restatement § 331. A merger is "the combining of two or more plans into a single plan." 26 C.F.R. 1.414(*l*)-1(b)(2). An employer's decision whether to merge a plan with another plan is thus a decision about the design, composition, and structure of the plans. In this case, for example, merger would eliminate the Crown plan's structure and replace it with the separate terms, benefits, and procedures of the PIUMPF. See Pet. App. 32, 57 (noting different features of the PIUMPF). The courts of appeals that have considered the question have therefore correctly concluded that an employer's decision whether to merge a plan is a settlor function that is not subject to ERISA's fiduciary obligations. See *Malia*, 23 F.3d at 833; *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). The courts of appeals have likewise declined to impose fiduciary duties on decisions to make similar plan modifications, such as transferring assets and liabilities between plans or spinning off assets and liabilities to create a new plan. See *Flanigan* v. *General Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir.), cert. denied, 534 U.S. 1065 (2001); *King* v. *National Human*

Res. Comm., Inc., 218 F.3d 719, 723-724 (7th Cir. 2000); *Systems Council EM-3* v. *AT&T Corp.*, 159 F.3d 1376, 1379-1380 (D.C. Cir. 1998). The interests of participants and beneficiaries are protected with respect to settlor decisions to make plan modifications by specific restrictions in ERISA itself and its implementing regulations rather than by ERISA's general fiduciary duties. See pp. 18-22, 24 & n.9, *infra*.

Because an employer's decision whether to terminate a plan and its decision whether to merge a plan with another plan are, considered separately, settlor rather than fiduciary functions, it follows that the choice to pursue one course rather than the other is also a settlor function. That choice is necessarily a decision about plan design, composition, and structure. Moreover, it is wrong to conceive of termination and merger as equivalent alternatives. A decision to terminate a plan has very different consequences than a decision to merge a plan. See pp. 19-20, 24-25, *infra*. The next most likely option for an employer considering termination might be to do nothing at all rather than to pursue the very different course of merger. Thus, Crown's decision whether to terminate its pension plan by purchasing annuities, to merge it with PACE's multiemployer plan, or to do nothing at all was a settlor decision that Crown was free to make for business reasons.

b. The court of appeals mistakenly concluded that Crown had a fiduciary duty to consider merger on the theory that merger was a possible means of implementing Crown's decision to terminate the plan. As discussed below, the court was incorrect in concluding that merger is a method of plan termination. See pp. 17-25, *infra*. Even apart from that error, however, the court was incorrect in concluding that the choice between terminating a plan by purchasing annuities and merging the plan with another plan is a fiduciary decision.

The court of appeals incorrectly analogized that decision to a plan administrator's choosing between two insurance companies to provide annuities upon termination. ERISA

requires a "plan administrator" to purchase annuities as the means of distributing plan assets in a termination unless the plan and PBGC regulations permit another method of distribution. 29 U.S.C. 1341(b)(3)(A). The administrator's choice among potential annuity providers is a fiduciary decision because it involves a discretionary choice about how to expend plan assets. See 29 U.S.C. 1002(21)(A)(i); 60 Fed. Reg. 12,328 (1995). ERISA itself confirms that the decision is a fiduciary one because it assigns responsibility for the decision to the plan administrator, who is, by the very nature of his position, a fiduciary. See 29 U.S.C. 1341(b)(3)(A); 29 C.F.R. 2509.75-8, Q&A D-3. Both the DOL and the PBGC have therefore concluded that ERISA's fiduciary standards apply to the selection of an annuity provider. 29 C.F.R. 2509.95-1, 4041.28(c)(3).

In contrast, an employer's decision whether to merge a plan with another plan is not a choice about how to expend or otherwise manage or administer plan assets. Moreover, unlike the purchase of annuities, ERISA does not assign the decision whether to merge to the plan administrator. Indeed, although ERISA directly addresses who makes that decision only in the context of a merger between multiemployer plans, ERISA expressly assigns the decision to the plan sponsor in that context. 29 U.S.C. 1411(a) and (b). Accordingly, the decision whether to merge two plans is not a fiduciary decision. And it is not transformed into one simply because it is mischaracterized as a method of implementing a plan termination. It remains a settlor function, however it is labeled.

B. Merger Is Not A Permissible Method Of Terminating A Single-Employer Defined Benefit Pension Plan

In addition to its error in treating an employer's decision whether to merge plans as a fiduciary decision, the court of appeals also erred in holding that merger is a permissible method of terminating a defined benefit plan. ERISA's provisions governing plan termination and the PBGC's implementing regulations establish that merger is not a means of accom-

plishing plan termination. Instead, merger is a separate and distinct procedure that plan sponsors may use to alter the structure or composition of a plan.

1. ERISA's text makes clear that merger is not a method of plan termination

As this Court noted in *Hughes Aircraft*, 29 U.S.C. 1341 provides the exclusive means for voluntary termination ofa single-employer defined benefit plan. See 525 U.S. at 446. Section 1341(b), which governs the standard termination involved here, makes clear that merger is not a permissible method of effectuating termination. It states that, in a termination, the plan administrator "shall distribute" the plan assets "in accordance with [29 U.S.C. 1344]." 29 U.S.C. 1341(b)(3)(A). In a merger, plan assets are not "distribute[d]," and the requirements of Section 1344 are not satisfied.

a. "Distribute" means "to divide and give out in shares." *Random House Dictionary of the English Language* 572 (2d ed. 1987). See *Webster's Third New International Dictionary* 660 (1993) (*Webster's*) ("To divide among several or many: deal out: apportion esp. to members of a group or over a period of time."); *Black's Law Dictionary* 508 (8th ed. 2004) (*Black's*) ("To apportion; to divide among several"). Distribution thus contemplates "an apportioning of something among many by separating it into parts" and "assigning each part * * * to its appropriate person or place." *Webster's* 660.

In trust law, distribution connotes the apportionment of the trust assets among, and their delivery to, the trust beneficiaries. See *Black's* 509 (defining "trust distribution" as "cash or other property paid or credited to a trust beneficiary"); Bogert § 814, at 302 (payment should generally be made to the beneficiary personally). "Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him or, if the trustee has possession but not title, to deliver pos-

session to him." Restatement § 345, at 193; see Bogert § 1010, at 457.

The requirement in Section 1341 that the plan administrator "distribute" the plan assets upon termination thus means that the administrator must divide the assets among the plan participants and beneficiaries and deliver to each his or her respective share. That does not occur when a defined benefit plan is merged with another defined benefit plan. The assets of the merging plan are neither divided among nor delivered to the beneficiaries of that plan. Instead, the assets are transferred en masse to the plan created by the merger, where they are commingled to fund the benefits of the participants in that plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2) (requiring that, following a merger, all of the assets of the merged plan be available to pay benefits to employees who are covered by the plan and their beneficiaries); *Hughes Aircraft*, 525 U.S. at 440 (noting that, in a defined benefit plan, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool").[5]

b. Because a merger does not result in a distribution of plan assets, a merger also cannot comply with the requirements of Section 1344. That provision requires that the assets of the terminating plan be allocated "among the participants and beneficiaries of the plan" according to a specified order of priority. 29 U.S.C. 1344(a); *Tilley*, 490 U.S. at 717-718 & n.3. Contrary to those requirements, in a merger, the assets of the merging plan are transferred to the new merged plan, where they are commingled and used to satisfy the benefit claims

[5] Section 1341(b)(3)(A) also contains a specific requirement regarding the distribution of plan assets owed to a "missing participant"—"a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search." 29 U.S.C. 1350(b)(1). A plan administrator satisfies Section 1341(b)(3)(A) for a missing participant only if the assets that are due to the participant are transferred to the PBGC as "trustee" or used to purchase an annuity. See 29 U.S.C. 1341(b)(3)(A)(ii), 1350(a)(1) and (2). Neither of those options is available in a merger.

not only of the participants and beneficiaries of the merging plan, but also of the other participants and beneficiaries of the plan created by the merger.

Section 1344(d) further provides that, if all benefits are satisfied, there may in some circumstances be a reversion or distribution of residual assets to the employer. See 29 U.S.C. 1344(d)(1) and (3). In a merger, however, there is no possibility of a reversion to the employer. The plan assets are all transferred to the merged plan. And, once the assets are in the merged plan, they are subject to ERISA's anti-inurement rule, which prohibits their use for the benefit of the employer. See 29 U.S.C. 1103(c).

c. The court of appeals failed even to address the provisions of Section 1344. As for the distribution requirement of Section 1341(b)(3)(A), the court of appeals erroneously concluded that the purchase of annuities "does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan." Pet. App. 14. The court reasoned that "[b]oth scenarios would involve a series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination." *Id.* at 14-15. That analysis ignores the fact that ERISA itself establishes that the purchase of annuities satisfies the distribution requirement because ERISA specifies it as the primary method of distribution. 29 U.S.C. 1341(b)(3)(A)(i). The court of appeals' analysis also overlooks the fact that the purchase of annuities, unlike a merger, involves the division of plan assets among, and their delivery to, the plan participants and beneficiaries. The annuities are issued in the names of the individual participants and beneficiaries, who enjoy an unfettered, contractually enforceable right to their respective annuities. See 29 C.F.R. 4001.2. In contrast, in a merger, the plan assets are not divided among the individual participants and beneficiaries, and they receive no assets unless and until they are paid benefits under the plan that results from the merger.

2. *The PBGC's regulations do not permit merger as a method of plan termination*

Section 1341(b) requires distribution of the assets of a terminating plan to be accomplished by the purchase of annuities or by "otherwise fully provid[ing] all benefit liabilities" "in accordance with the provisions of the plan and any applicable regulations." 29 U.S.C. 1341(b)(3)(A). Thus, any alternative method of distributing assets must be permitted by the PBGC's regulations. As discussed below, the PBGC does not view its regulations as permitting merger as an alternative method of asset distribution. The PBGC's interpretation of its regulations is reasonable and entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Boivin* v. *U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006).[6]

The PBGC's regulations require distribution of the assets of a terminating plan "in accordance with all applicable requirements under * * * ERISA," 29 C.F.R. 4041.28(c)(1), and, in particular, the allocation requirements of Section 1344, 29 C.F.R. 4044.4(a). As explained above, merger is not a distribution, and a merger cannot satisfy Section 1344's allocation requirements.

The regulations also require the plan administrator to "distribute plan assets in satisfaction of all plan benefits." 29 C.F.R. 4041.28(c)(1). Consistent with the meaning of "distribute" under trust law, and the requirement that all plan benefits be satisfied, the PBGC interprets that regulatory provision to require that (1) the assets will be divided among the participants and beneficiaries of the terminating plan, and

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[6] As the government noted in its brief at the petition stage, the Crown plan did not permit merger as a means of distributing plan assets in a termination, and the court of appeals erred in concluding that petitioner had forfeited the issue. See U.S. Amicus Br. 13 n.3. Petitioner, however, did not raise that fact-bound issue in his petition for a writ of certiorari, and this Court need not address it, because the case is more appropriately resolved by deciding the legal issues on which the Court granted review.

(2) those participants and beneficiaries will actually receive their benefits, either through an annuity, which is the distribution form authorized by the statute, or through a lump sum payment equal to the present value of the benefits. See *Webster's* 2017 (defining "satisfaction" as "discharge of a legal obligation or settlement of a claim"); *Black's* 1370 (defining "satisfaction" as "fulfillment of an obligation; esp., the payment in full of a debt); 29 C.F.R. 4041.28(c)(1) and (2).[7]

Those criteria are not satisfied in a merger. Instead, as described above, the assets are transferred to the new plan created by the merger, where they are used to provide benefits to other individuals besides the participants and beneficiaries of the merging plan. In addition, participants and beneficiaries do not actually receive their benefits in the form of annuity contracts or cash. Rather, they receive only the promise of future payments from the merged plan—payments which, unlike lump sum distributions or annuities, are contingent on the continued health of that plan.

Other components of the PBGC's regulations reinforce the conclusion that merger is not a permissible method of accomplishing plan termination. For example, the regulations require that the notice of plan termination inform each participant that, after distribution of the plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9). But a merger does not extinguish the PBGC's guarantee. Instead, the PBGC continues to guarantee benefits under the merged plan.

The court of appeals incorrectly concluded that the PBGC's regulations authorize merger as a method of plan termination because they allow distribution of assets in a termination to be effected either by the purchase of annuities

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[7] In order to avoid taxation, a participant or beneficiary who is entitled to a lump sum distribution under the plan may elect to have his or her distribution transferred or "rolled over" into an individual retirement account (IRA) or another qualified plan. 26 U.S.C. 402(c) (2000 & Supp. IV 2004).

"or in another permitted form." 29 C.F.R. 4041.28(c)(1). The phrase "another permitted form" refers to a lump sum cash distribution, if permitted by the plan, or the rollover of such a distribution into an IRA or another qualified plan. The phrase could conceivably encompass a distribution method other than a lump sum payment or rollover if that method were permitted by the relevant plan, ERISA, and the PBGC's regulations. Merger does not meet those criteria.

3. ERISA's structure indicates that merger is not a method of plan termination

The structure of ERISA confirms that merger is not a method of terminating a single-employer plan. ERISA treats merger and termination as distinct procedures. Mergers are addressed in statutory sections separate from those governing terminations. Compare 29 U.S.C. 1058 (mergers generally), 1411 and 1412 (mergers involving multiemployer plans), and 26 U.S.C. 414(*l*) (tax implications of mergers) with 29 U.S.C. 1341 (terminations of single-employer plans) and 1341a (terminations of multiemployer plans).[8]

Moreover, the statutory provisions addressing mergers impose different requirements from those applicable to termi-

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[8] The court of appeals mistakenly reasoned that merger is a method of termination because the provisions governing termination and some provisions governing merger are located in the same title of ERISA—Title IV. See Pet. App. 12-13. That reasoning ignores the fact that the principal ERISA provision governing merger is located in Title I rather than Title IV. See 29 U.S.C. 1058. Moreover, the termination provisions are located in a separate subtitle (Subtitle C) from the Title IV merger provisions (which are located in Part 2 of Subtitle E). And the termination provisions and the Title IV merger provisions were enacted by different laws many years apart. Compare ERISA, Pub. L. No. 93-406, § 4041, 88 Stat. 1020 (enacting original termination provisions), and Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, § 11008, 100 Stat. 244 (enacting current termination provisions, subject to some later modifications), with Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 104(2), 94 Stat. 1244 (enacting Title IV merger provisions).

nations. For example, the merger provisions generally require that participants' benefits be no lower after a merger than they were before the merger. See 29 U.S.C. 1058, 1411(b)(2), 1412(b).[9] Those provisions do not, however, give participants the same rights to receive plan assets that the participants have in a plan termination. See, *e.g.*, *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63 (2d Cir. 1997), cert. denied, 525 U.S. 1138 (1999), and *Malia*, 23 F.3d at 831-832. In addition, a plan administrator cannot begin a termination without providing notice to the PBGC. The PBGC can then block the termination if it finds that assets will not be sufficient to provide for benefit liabilities. 29 U.S.C. 1341(b)(2)(C) and (D). The PBGC has no comparable authority to block a merger, and it may not even receive notice of a merger until after it is completed. See 29 U.S.C. 1343(a), 1343(c)(8) (requiring notice after merger); compare 29 U.S.C. 1411(b) (advance notice required for merger of multiemployer plans) with 29 U.S.C. 1412 (no advance notice required for merger of single-employer plan into multi-employer plan).

This statutory structure reflects the fact that merger and termination are two fundamentally different actions. Termination ends the plan's existence. Upon completion of a standard termination, the employer has no further obligations under ERISA, and the PBGC's guarantee for the plan ceases. All plan benefits are satisfied, so there is no longer any risk that participants and beneficiaries will not receive their promised benefits because of deterioration in the financial health of the plan. Merger, in contrast, merely transforms the merging plan into a different plan that remains subject to ERISA. The employer does not remove itself from the ERISA framework, and the PBGC continues to guarantee plan benefits. Moreover, whether plan participants and beneficiaries ultimately receive their benefits depends upon the continued

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[9] That same requirement applies to transfers of assets and liabilities. See 29 U.S.C. 1058, 1411(b)(2), 1412(b).

health of the new plan created by the merger. The court of appeals ignored those essential differences in concluding that merger is a method of plan termination.

4. The PBGC opinion letters cited by respondent do not suggest that merger is a method of plan termination

Respondent incorrectly argues (Br. in Opp. 14-17) that three PBGC opinion letters support the court of appeals' holding that merger is a method of terminating a plan. None of the letters—which were issued before the enactment of the current ERISA termination provisions and implementing regulations—supports that holding.

The letters addressed the applicability of 1984 Joint Guidelines issued by the PBGC, the DOL, and the Internal Revenue Service (IRS) to certain transfers of assets and liabilities between plans. The 1984 Guidelines were promulgated to address efforts by employers to reach surplus assets in their pension plans without purchasing annuities for all plan participants and beneficiaries, which the employers would have been required to do if they entirely terminated the plans. In one such scheme, an employer would split a plan into two plans, one for active employees and the other for former employees, including retirees. The employer would then terminate the plan for the former employees and recover a reversion of excess plan assets. See Br. in Opp. App. 8a-9a, 12a-13a. The Guidelines made clear that, in such a spin-off/termination, the PBGC would generally not recognize a termination nor allow the employer to recover surplus assets, unless the employer (among other things) purchased annuity contracts that provided for the accrued benefits of the participants and beneficiaries of both the terminating plan and the ongoing plan. See Br. in Opp. App. 2a-4a (1984 Guidelines).

Two of the opinion letters involved an employer that had split a plan into two plans, each covering a separate category of employees. The employer later decided to terminate one of the plans in order to obtain a reversion of surplus assets and

to establish a successor plan with the same benefits for the participants and beneficiaries of the terminated plan. The PBGC opined that the 1984 Guidelines did not apply to that situation, and the employer was not required to annuitize the benefits of the participants and beneficiaries of the ongoing plan. The PBGC did not suggest, however, that the spin-off of the ongoing plan constituted a method of plan termination. Nor did the PBGC suggest that an employer could terminate any plan without following ordinary termination procedures, including the requirements for distributing plan assets and allocating them among plan participants and beneficiaries. And the letters certainly did not indicate that an employer has a fiduciary duty to consider a spin-off as an alternative to terminating a plan by purchasing annuities. See PBGC Op. Ltr. 85-11 (May 14, 1985) (Br. in Opp. App. 6a-9a); PBGC Op. Ltr. 85-21 (Aug. 26, 1985) (Br. in Opp. App. 10a-13a).

The third opinion letter involved "a transfer [of assets and liabilities] from a single-employer plan to an ongoing multiemployer plan *followed by* the termination of the single-employer plan." PBGC Op. Ltr. 85-25 (Oct. 11, 1985) (Br. in Opp. App. 15a) (emphasis added). The PBGC opined only that the situation was not covered by the 1984 Guidelines. The PBGC did not suggest that the transfer of assets and liabilities was itself a method of accomplishing the subsequent termination. Nor did the PBGC suggest that the termination could be accomplished without following the ordinary procedure of purchasing annuities or otherwise distributing the assets of the terminating plan to the participants and beneficiaries in accordance with statutory and regulatory requirements. Indeed, the PBGC cautioned that "if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination under Title IV." *Ibid.* See *ibid.* (noting that the PBGC would not recognize the validity of the termination if there was an "intent to circum-

vent the termination requirements" by first transferring assets and liabilities out of the plan). Finally, the PBGC did not suggest that an employer has a fiduciary obligation to consider making a transfer of assets and liabilities before or in lieu of terminating a plan.[10]

C. Requiring An Employer To Consider Merger As A Means of Plan Termination Would Undermine The Purposes of ERISA

The court of appeals' holding is not only inconsistent with the well-established distinction between settlor and fiduciary functions, ERISA's text and structure, and the PBGC's regulations, but it is also contrary to the purposes of the Act.

1. One of ERISA's basic goals is to encourage the creation and funding of employee benefit plans. 29 U.S.C. 1001(a), 1001a(c), 1001b(c). The holding of the court of appeals, if affirmed, would have the opposite effect.

As discussed above, the freedom of employers to alter or terminate plans encourages them to create those plans, because it reassures employers that they have the flexibility to modify the plans for business reasons. See p. 13, *supra*. If employers had a fiduciary duty to consider merger as a means of terminating a plan, they would not be free to choose termination when it made business sense. Instead, in some circumstances, an employer would be forced to continue maintaining an ERISA plan even though continuing to do so was against its business interests. That prospect would likely discourage some employers from creating ERISA plans in the first instance.

In addition, a requirement to consider merger as a means of termination would mean that employers would, in some

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[10] Respondent also erroneously states that Opinion Letter 85-25 indicates that an employer may obtain a reversion following a merger. On the contrary, the letter emphasizes that "[a] valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer." PBGC Op. Ltr. 85-25 (Oct. 11, 1985) (Br. in Opp. App. 15a). See p. 20, *supra*.

instances, be precluded from terminating over-funded plans to obtain a reversion of excess plan assets. Presumably, over-funded plans would be the most likely to attract an eager merger partner, whose offer the sponsor of the over-funded plan might have to consider as an alternative to terminating the plan and obtaining a reversion. The possibility that employers would not be able to obtain reversions would likely discourage them from adequately funding their plans. The authority to recover residual assets reassures employers that they will be able to recoup their money if the plans have more resources at termination than they need. That authority thus encourages adequate plan funding. See p. 13, *supra*. Depriving employers of that authority, in contrast, would deprive them of the assurance that they could recoup any over-funding, and therefore would create an incentive for them to minimize the amount that they contribute to their plans. See *Hawkeye Nat'l Life Ins. Co.* v. *Avis Indus. Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997); *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988).

2. Another important goal of ERISA is to increase the likelihood that participants and beneficiaries of single-employer defined benefit plans will receive their full benefits. 29 U.S.C. 1001, 1001b(c). That goal too would be frustrated by the rule adopted by the court of appeals.

The purchase of annuity contracts from a financially sound insurance company ensures that plan participants and beneficiaries will receive their full benefits. That is particularly true because, under the DOL's interpretation of the Act, fiduciaries of a terminating defined benefit pension plan who purchase annuity contracts generally have a fiduciary duty to take steps calculated to obtain the safest annuities available. 29 C.F.R. 2509.95-1(c).

In the view of the DOL and the PBGC, when a plan is merged rather than terminated by the purchase of annuities, participants and beneficiaries face a greater risk that they will not receive their full benefits. The merger provides them

only a promise of future benefits under the merged plan, the payment of which is contingent on the continued health of that plan. The added risk to participants and beneficiaries is particularly great in the type of merger proposed by respondent PACE—merger of a single-employer plan into a multiemployer plan. Although the PBGC continues to guarantee benefits under the multiemployer plan, the PBGC's guarantee is substantially less than under the single-employer plan. Compare 29 U.S.C. 1322 with 29 U.S.C. 1322a.[11]

3. Finally, imposing a fiduciary duty on employers to consider merger as a means of terminating their plans would undermine ERISA's goal of ensuring a financially sound termination insurance system. See 29 U.S.C. 1001(c), 1001a(c), 1001b(a) and (c). Some plans that would have been terminated and satisfied their full benefit liabilities by the purchase of annuities or otherwise would instead be required to merge with other plans. As a result, the PBGC would have to continue to insure those plans, and the insurance program would remain exposed to potential liability.

There has been some improvement in the PBGC's financial condition in the past two years, but existing plans continue to be massively underfunded, and the PBGC's future exposure to losses from financially troubled sponsors remains high. See PBGC, *Annual Management Report, Fiscal Year 2006*, at 3-5, 14-16 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf> (PBGC Report). Despite attempts to address underfunding problems with new funding rules in the Pension Protection Act of 2006, Pub. L. No. 109-280, Tits. I, II, 120 Stat. 784, 858; PBGC Report 8, the PBGC is not in a

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[11] For example, under a single-employer plan terminating in 2007, the maximum guarantee for a straight-life annuity at age 65 is $49,500 annually. See http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html. By contrast, for a worker with 30 years of service under a multiemployer plan, the maximum annual benefit guarantee is $12,870. PBGC, *Annual Management Report, Fiscal Year 2006*, at 12-13 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf>.

position unnecessarily to assume responsibility for more underfunded plans.[12]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] The single-employer insurance program has a deficit of more than $18.1 billion, and the PBGC estimates a reasonably possible exposure to $73 billion in underfunding. PBGC Report 4-5, 14-15. The total underfunding in all single-employer plans is estimated to be $350 billion. *Id.* at 15. The PBGC's separate multiemployer plan insurance program has a deficit of $739 million, and $83 million in reasonably possible liability. *Id.* at 5, 14, 16. The total underfunding in multiemployer plans is estimated to be more than $150 billion. *Id.* at 15.

STATUTORY APPENDIX

1. Section 1001 of Title 29, United States Code, provides:

Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administra ion of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum stan-

dards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of

service, to meet minimum standards of funding, and by requiring plan termination insurance.

* * * * *

2. Section 1001a of Title 29, United States Code provides, in pertinent part:

Additional Congressional findings and declaration of policy

* * * * *

(c) Policy

It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

* * * * *

3. Section 1001b of Title 29, United States Code provides, in pertinent part:

Findings and declaration of policy

(a) Findings

The Congress finds that—

(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest;

(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;

(3) the existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiaries of such plans; and

(4) the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

* * * * *

(c) Declaration of policy

It is hereby declared to be the policy of this title—

(1) to foster and facilitate interstate commerce;

(2) to encourage the maintenance and growth of single-employer defined benefit pension plans;

(3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits;

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship;

(5) to maintain the premium costs of such system at a reasonable level; and

(6) to assure the prudent financing of current funding deficiencies and future obligations of the single-

employer pension plan termination insurance system by increasing termination insurance premiums.

* * * * *

4. Section 1002 of Title 29, United States Code provides, in pertinent part:

Definitions

* * * * *

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

* * * * *

5. Section 1058 of Title 29, United States Code provides:

Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which subchapter III of this chapter applies.

6. Section 1104 of Title 29, United States Code provides, in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * * *

7. Section 1341 of Title 29, United States Code, provides, in pertinent part:

Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of non compliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth—

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Notice to participants and beneficiaries of benefit commitments[1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

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[1] So in original. Probably should be "benefit liabilities".

(C) Notice from the corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits)

as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

* * * * *

8. Section 1343 of Title 29, United States Code, provides, in pertinent part:

Reportable events

(a) Notification that event has occurred

Within 30 days after the plan administrator or the contributing sponsor knows or has reason to know that a reportable event described in subsection (c) of this section has occurred, he shall notify the corporation that such event has occurred, unless a notice otherwise required under this subsection has already been provided with respect to such event. The corporation is authorized to waive the requirement of the preceding sentence with respect to any or all reportable events with respect to any plan, and to require the notification to be made by including the event in the annual report made by the plan.

* * * * *

(c) Enumeration of reportable events

For purposes of this section a reportable event occurs—

* * * * *

(8) when a plan merges, consolidates, or transfers its assets under section 1058 of this title, or when an alternative method of compliance is prescribed by the Secretary of Labor under section 1030 of this title;

* * * * *

9. Section 1344 of Title 29, United States Code, provides, in pertinent part:

Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * * * *

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

* * * * *

(3) (A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants'

mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

* * * * *

10. Section 1350 of Title 29, United States Code, provides, in pertinent part:

Missing participants

(a) General rule

(1) Payment to the corporation

A plan administrator satisfies section 1341 (b)(3)(A) of this title in the case of a missing participant only if the plan administrator—

(A) transfers the participant's designated benefit to the corporation or purchases an irrevocable commitment from an insurer in accordance with clause (i) of section 1341(b)(3)(A) of this title, and

(B) provides the corporation such information and certifications with respect to such designated benefits or irrevocable commitments as the corporation shall specify.

(2) Treatment of transferred assets

A transfer to the corporation under this section shall be treated as a transfer of assets from a terminated plan to the corporation as trustee, and shall be held with assets of terminated plans for which the corporation is trustee under section 1342 of this title, subject to the rules set forth in that section.

* * * * *

(b) Definitions

For purposes of this section—

(1) Missing participant

The term "missing participant" means a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search.

* * * * *

11. Section 1411 of Title 29, United States Code, provides, in pertinent part:

Mergers and transfers between multiemployer plans

(a) Authority of plan sponsor

Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b) of this section.

(b) Criteria

A merger or transfer satisfies the requirements of this section if—

(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

(2) no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and

(4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as

of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

* * * * *

12. Section 1412 of Title 29, United States Code, provide, in pertinent part:

Transfers between a multiemployer plan and a single-employer plan

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger

No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) of this section than the benefit immediately before that date.

* * * * *

REGULATORY APPENDIX

1. Section 1.414(*l*)-1 of Title 26, Code of Federal Regulations, provides in pertinent part:

Mergers and consolidations of plans or transfers of plan assets.

* * * * *

(b) *Definitions.* For purposes of this section:

(1) Single plan. A plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

(i) The plan has several distinct benefit structures which apply either to the same or different participants,

(ii) The plan has several plan documents,

(iii) Several employers, whether or not affiliated, contribute to the plan,

(iv) The assets of the plan are invested in several trusts or annuity contracts, or

(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan documents, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

(2) *Merger or consolidation.* The terms "merger" or "consolidation" means the combining of two or more plans into a single plan. A merger or consolidation will not occur merely because one or more corporations undergo a reorganization (whether or not taxable). Furthermore, a merger or consolidation will not occur if two plans are not combined into a single plan, such as by using one trust which limits the availability of assets of one plan to provide benefits to participants and beneficiaries of only that plan.

* * * * *

2. Section 2509.75-8 of Title 29, Code of Federal Regulations, provides in pertinent part:

Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75-5 (29 CFR 2555.75-5) which was issued on June 24, 1975, and published in the Federal Register on July 28, 1975 (40 FR 31598).

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

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D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, by the very nature of his position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries. Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

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3. Section 2509.95-1 of Title 29, Code of Federal Regulations, provides:

Interpretive bulletin relating to the fiduciary standard under ERISA when selecting an annuity provider.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider.

(b) In General. Generally, when a pension plan purchases an annuity from an insurer as a distribution of benefits, it is intended that the plan's liability for such benefits is transferred to the annuity provider. The Department's regulation defining the term "participant covered under the plan" for certain purposes under title I of ERISA recognizes that such a transfer occurs when the annuity is issued by an insurance company licensed to do business in a State. 29 CFR 2510.3-3(d)(2)(ii). Although the regulation does not define the term "participant"' or "beneficiary" for purposes of standing to bring an action under ERISA Sec. 502(a), 29 U.S.C. 1132(a), it makes clear that the purpose of a benefit distribution annuity is to transfer the plan's liability with respect to the individual's benefits to the annuity provider.

Pursuant to ERISA section 404(a)(1), 29 U.S.C. 1104(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A), states

that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. In addition, section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires a fiduciary to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.

(c) Selection of Annuity Providers. The selection of an annuity provider for purposes of a pension benefit distribution, whether upon separation or retirement of a participant or upon the termination of a plan, is a fiduciary decision governed by the provisions of part 4 of title I of ERISA. In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) The quality and diversification of the annuity provider's investment portfolio;

(2) The size of the insurer relative to the proposed contract;

(3) The level of the insurer's capital and surplus;

(4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) The availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

(d) Costs and Other Considerations. The Department recognizes that there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity. Such situations may occur where the safest available annuity is only marginally safer, but disproportionately more expensive than competing annuities, and the participants and beneficiaries are likely to bear a significant portion of that increased cost. For example, where the participants in a terminating pension plan are likely to receive, in the form of increased benefits, a substantial share of the cost savings that would result from choosing a competing annuity, it may be in the interest of the participants to choose the competing annuity. It may also be in the interest of the participants and beneficiaries to choose a competing annuity of the annuity provider offering the safest available annuity is unable to demonstrate the ability to administer the payment of benefits to the participants and beneficiaries. The Department notes, however, that increased cost or other considerations could never justify putting the

benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity.

In contrast to the above, a fiduciary's decision to purchase more risky, lower-priced annuities in order to ensure or maximize a reversion of excess assets that will be paid solely to the employer-sponsor in connection with the termination of an over-funded pension plan would violate the fiduciary's duties under ERISA to act solely in the interest of the plan participants and beneficiaries. In such circumstances, the interests of those participants and beneficiaries who will receive annuities lies in receiving the safest annuity available and other participants and beneficiaries have no countervailing interests. The fiduciary in such circumstances must make diligent efforts to assure that the safest available annuity is purchased.

Similarly, a fiduciary may not purchase a riskier annuity solely because there are insufficient assets in a defined benefit plan to purchase a safer annuity. The fiduciary may have to condition the purchase of annuities on additional employer contributions sufficient to purchase the safest available annuity.

(e) Conflicts of Interest. Special care should be taken in reversion situations where fiduciaries selecting the annuity provider have an interest in the sponsoring employer which might affect their judgment and therefore create the potential for a violation of ERISA § 406(b)(1). As a practical matter, many fiduciaries have this conflict of interest and therefore will need to obtain and follow independent expert advice calculated to identify those insurers with the highest claims-paying ability willing to write the business.

4. Section 4001.2 of Title 29 Code of Federal Regulations, provides, in pertinent part:

Definitions.

For purposes of this chapter (unless otherwise indicated or required by the context):

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Insurer means a company authorized to do business as an insurance carrier under the laws of a State or the District of Columbia.

Irrevocable commitment means an obligation by an insurer to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary.

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5. Section 4041.23 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Notice of intent to terminate

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(b) *Contents of notice.* The PBGC's standard termination forms and instructions package includes a model notice of intent to terminate. The notice of intent to terminate must include—

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(9) *Extinguishment of guarantee.* A statement that after plan assets have been distributed in full satisfaction of all plan benefits under the plan with respect to a participant or a beneficiary of a deceased participant, either by the

purchase of irrevocable commitments (annuity contracts) or by an alternative form of distribution provided for under the plan, the PBGC no longer guarantees that participant's or beneficiary's plan benefits.

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6. Section 4041.28 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Closeout of plan

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(c) *Method of distribution*—(1) *In general.* The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

(2) *Lump sum calculations.* In the absence of evidence establishing that another date is the "annuity starting date" under the Code, the distribution date is the "annuity starting date" for purposes of—

(i) Calculating the present value of plan benefits that may be provided in a form other than by purchase of an irrevocable commitment from an insurer (e.g., in selecting the interest rate(s) to be used to value a lump sum distribution); and

(ii) Determining whether plan benefits will be paid in such other form.

(3) *Selection of insurer.* In the case of plan benefits that will be provided by purchase of an irrevocable commitment from an insurer, the plan administrator must select the insurer in accordance with the fiduciary standards of Title I of ERISA.

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7. Section 4044.4 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Violations

(a) *General.* A plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in section 4044 of ERISA and this subpart, except as may be required to prevent disqualification of the plan under the Code and regulations thereunder.

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